UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al.,	:	Civil Action No.:
	:	1:23-cv-108
Plaintiffs,	:	
versus	:	
	:	Friday, August 25, 2023
GOOGLE LLC,	:	Alexandria, Virginia
	:	Pages 1-67
Defendant.	:	

The above-entitled motions hearing was heard before the Honorable John F. Anderson, United States Magistrate Judge. This proceeding commenced at 11:01 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Calling Civil Action Matter Number 23-cv-108, United States, et al. versus Google LLC.

THE COURT: Okay. Counsel need to introduce themselves, please.

MR. TROY: Good morning, Your Honor. Matthew Troy, Assistant U.S. Attorney, United States Attorney's Office.

MS. WOOD: Good morning, Your Honor. Good to see you. Julia Wood for the United States. My colleague, Katherine Clemons, will be arguing today.

THE COURT: Clemons; is that correct? I just want to make sure I have the name right. Okay.

MR. HENRY: Good morning, Your Honor. Ty Henry from the Office of the Attorney General of Virginia on behalf of the plaintiff states.

THE COURT: Thank you.

MR. WOLIN: And good morning, Your Honor. Michael Wolin from the Antitrust Division on behalf of the United States.

MR. REILLY: Good morning, Your Honor. Craig Reilly here for Google, together with my co-counsel, Karen Dunn.

MS. DUNN: Good morning, Your Honor.

THE COURT: Good morning.

MR. REILLY: And Erica Spevack from the Paul, Weiss firm. Ms. Dunn, with the Court's permission, will address the Court.

Also here in the well of the Court is Eric Mahr and Andrew Ewalt, who the Court has met. We expect one other attorney may be joining us, not to present, but to be present, Martha Goodman. And I would just request the Court's permission to allow her to take a seat at counsel table when she arrives.

THE COURT: Okay.

MR. REILLY: But we can proceed without her.

THE COURT: Okay.

MR. REILLY: Thank you, Your Honor.

THE COURT: Well, Ms. Dunn, let me have you come up first.

You know, just a couple of things initially. I think at least multiple times I have suggested to the parties that the expedited briefing schedule should be used judicially. I think in my comments in that regard, I highlighted that motions involving privilege issues are ones that require extra time for the parties and for the Court.

You filed yesterday, at 4:00, 200 pages in a reply brief and exhibits on a motion that you filed last Friday and want me to decide today. I want to hear why it was a decision to do this on an expedited briefing schedule with

the understanding that you're going to end up filing a reply brief with close to 200 pages at the end of the day yesterday.

MS. DUNN: Your Honor, first of all, we obviously understand the Court's concern, and I want to assure the Court that we take very seriously Your Honor's caution that we only bring matters to this Court on an expedited basis extremely judicially.

This issue of privilege goes really to the heart of this case, to the heart of -- and to the heart of the damages case the government has brought.

THE COURT: In what way does it go to the heart of the case? They either have a damages case, or they don't have a damages case. Whether they started the investigation on December 22nd of last year or December 22nd of 2021, either they do or don't have a damages case.

So what do you mean by it goes to the heart of the damages case?

MS. DUNN: So, Your Honor, there are three things that I want to put --

THE COURT: Answer my question first --

MS. DUNN: Yes, I will do that.

THE COURT: -- and then you can expand upon it all you want.

MS. DUNN: Your Honor, the first piece is that it

goes to whether they have a damages case at all.

THE COURT: Okay. And what evidence relating to communications between December 22nd and January 22nd goes to whether they do or don't have a damages case?

MS. DUNN: So that period of time was the only period of time where they gathered factual information from the agencies on whose behalf they now claim damages and other agencies on whose behalf they do not claim damages.

THE COURT: You don't think they've been trying to get information from the agencies since January 22nd to the present and aren't continuing to investigate and prepare their damages case?

MS. DUNN: Your Honor, we agree they're continuing to prepare their damages case, and we are not seeking those communications. But the communications -- first of all, the communications that we have seen that have already been clawed back show the immediate reactions of these agencies to the government's outreach.

THE COURT: Okay. So --

MS. DUNN: Which, first of all, said they didn't --

THE COURT: But, again, Ms. Dunn, let me just understand this.

The damages case will be presented at a trial that will happen next year. You understand that. Whether they

had a weak damages case at one point and then they turned it into a strong damages case as the case progresses will be determined at the trial; not determined at the time the complaint gets filed.

You said in your brief -- I mean you started, factual information that's crucial to the defense of this case. You will be defending this case at a trial next year. What communications that happen between one month before the lawsuit got filed, you know, isn't going to be what this case is tried on. This case is going to be tried on their complete damages case.

So, again, I'm trying to understand what is so crucial and so important about this information for the defendant.

MS. DUNN: Yeah. And, Your Honor, first of all, if they don't have damages, they can't have a jury.

THE COURT: Okay.

MS. DUNN: So that needs to be decided before a trial.

THE COURT: And Judge Brinkema will do that, but that issue isn't in front of me right now, and that -- once that issue gets teed up, they'll be able to present what evidence they have on their damages case.

MS. DUNN: Second of all, Your Honor, there is the issue of relevant market. And when the government reached

out to these agencies, their responses were often, we don't understand what you're talking about, that's not how ad purchasing works. And those documents, we feel confident -- and we hope Your Honor will review them in camera if there's any indecision -- will demonstrate that the market of the actual only agencies that they are here representing don't agree with their version of the market. They say that that's not how ad buying works, and so these documents --

THE COURT: Well, that -- what their opinion --

MS. CLEMONS: Your Honor, could I object to her referring to documents that are privileged and have been withheld or clawed back that counsel has seen prior to those clawbacks?

THE COURT: Well, whatever an employee of an agency thinks is not going to be crucial to your case. Whether a marketing person at one agency thinks something or isn't familiar with the term or doesn't think that's right, you know, that is one person's testimony about what he or she thinks.

MS. DUNN: Your Honor, these are the plaintiffs in the case. These are the people on behalf of whom DOJ is bringing the case. We are examining these witnesses as 30(b)(6) of the agency plaintiffs. They are the plaintiffs in this case. And they don't --

THE COURT: The plaintiff in this case is the

United States.

MS. DUNN: The United States has identified eight agencies on behalf of whom it asserts that it's bringing this case and bringing this case for damages. Those 30(b)(6) depositions are incredibly important.

This is a case that -- where the government seeks to reframe an entire industry that is a multibillion dollar industry. They've brought the case on behalf of eight agencies. The 30(b)(6) deponents, our testimony and documents will undermine their market definition, which, in a civil antitrust case, is a threshold issue before you even get to trial.

THE COURT: A very important issue, but not an issue that someone who is boots-on-the-ground necessarily understands. A legal issue of market share is something that is legal, not necessarily something in the advertising industry.

So I'm just --

MS. DUNN: Your Honor, respectfully, market share is different than market definition and relevant market. Market share is a totally different thing, and I agree, experts can testify to market share.

Market definition, the standard for that is the commercial reality of the marketplace, and the only people in the commercial reality of the marketplace on the

government's side are these agency buyers of ads and their ad agencies. These are crucial witnesses. That's why we are spending our very small number of depositions on these agencies because they are going to define the commercial reality that defines the relevant market.

Second of all, Your Honor, there's an issue of whether they are direct purchasers, and that's an issue under *Illinois Brick*. So if they can't establish that they're direct purchasers, another reason that we need these documents, then --

THE COURT: Well, why do you need these documents? That's the part that I don't understand in your argument both that you filed last Friday and that you filed last night.

No one is saying that you can't get testimony about how they buy their advertising. That you can go through and you can say, you know, do you buy it directly? Do you buy it through this entity? Or through that entity? What goes -- the whole process of how they purchase their advertising is -- no one has said you can't get testimony about that.

MS. DUNN: Your Honor, we commend to the Court the *Booz Allen* case where that court looked at a very similar issue. And it was said expressly by that Court that the defendant was entitled -- this was a case where the ATR

Division was the plaintiff, they brought the same arguments they're bringing here, and they lost because the defendant is entitled to test that testimony. And we -- the documents from that --

THE COURT: Where did it say that in the *Booz Allen* case?

MS. DUNN: What?

THE COURT: Where did it say that in the *Booz Allen* case that they get to test the testimony? You're talking about the decision by Judge Blake in Maryland?

MS. DUNN: Yes, Your Honor.

THE COURT: Okay. So it discusses deliberative process in the first three pages. It has two paragraphs on the attorney/client privilege. It has two paragraphs on the work product doctrine where it finds that it is information that's covered by the work product doctrine but in good faith.

MS. DUNN: Your Honor, that's not -- no, this is not the case.

First of all, just to take a step back, Your Honor. The question is not -- the first question is, are these documents privileged, and we are seeking to discover --

THE COURT: Let's get into that argument in a minute. I'm just trying to understand what it is that you

think you can't have that deals with, one, your damages case. That is, how do they buy their advertising, what the process is, what the contractual relationship is, what their involvement is. Do they, you know, know that they're doing it through various processes and procedures, or is that their advertising agency making those decisions? So whether they're a direct purchaser or not.

MS. DUNN: Yes, Your Honor.

THE COURT: You're getting all that information; right?

MS. DUNN: Your Honor, in the *Booz Allen* case --

THE COURT: Well, again, I'll let you make your argument. I just want to know -- I want you to answer my questions.

MS. DUNN: Because we're not getting this -- first off, we're not getting this testimony because some amount of it has been clawed back. That's Point 1.

THE COURT: Well, that's relating in the communications.

MS. DUNN: But the witnesses are being examined about their purchases based on those documents. Those are documents that we --

THE COURT: Why are you using those documents? Why don't you just ask them about their purchases? How do you buy advertising? What is the contract? Who is it that

you buy from? How do you know about certain things? Not look at a document that they've clawed back and say, well, didn't you say this? Didn't you say that?

MS. DUNN: Well, Courts, including the *Booz Allen* Court and the *FEC v. Christian Coalition* Court in this district recognized that witnesses, first of all, often need the documents to refresh their recollection, to remember and to respond to. That's one thing.

And the second thing is that --

THE COURT: Again, let me understand that.

MS. DUNN: Yeah.

THE COURT: You don't think that in a 30(b)(6) deposition where the topic is how do you buy your advertising, that they're not going to come in prepared to talk about how they buy their advertising?

MS. DUNN: We have been deposing these witnesses, Your Honor, and it is true -- and it is in our briefs -- that when the witnesses are shown the documents, they recall things that they didn't recall before they are shown the documents. That's the first thing.

The second thing is, we are limited -- and this has been recognized also in *Booz Allen* and other cases -- in the number of depositions that we can take. So we need to take 30(b)(6) depositions of these agency plaintiffs, and we are entitled to test their testimony.

The other thing that's happening is now that we're -- we've deposed four of these witnesses, the witnesses have started to testify differently because they've been prepared for the questions that we're going to ask. So we need the documents that are prefiling, fact work product, fact -- and having -- not under the influence of preparing testimony for a litigation to test the testimony that we're getting. There's really no substitute for documents where something is written on a page. When you're in trial and you're examining a witness, they often are hemmed in by the words they wrote in the document. So -- and that has gone to the substantial need query that Courts have looked at.

THE COURT: So it's crucial to your case whether they know that a meeting was on January 3rd or January 8th? They know they had a meeting, they don't remember the particular date, but you need to have the documents so they can say whether it was on the 3rd or the 8th, and that's crucial to your case?

MS. DUNN: Your Honor, the testimony and the documents, we believe, go well beyond the question of what's the date. It's how they purchased, what they purchased, where they purchased it, what the market is that they operate in.

All of -- this is going to be -- a key issue in

this case is how are these purchasers purchasing their ads. They are going to be -- there's two kinds of witnesses who understand the commercial realities. One are the third parties who were also part of the government's investigation and investigative file, and they've turned over those documents.

The other are these agencies where those documents they concede are part of the investigative file or part of their investigation. We are entitled to that under statute and under the Antitrust Division's manual, and those have been withheld improperly under privilege.

So the first question is, are they privileged. And what the government is essentially saying is, every time an Antitrust Division lawyer reaches out and communicates with a federal employee -- lawyer or non-lawyer agency -- to investigate to gather facts, and then that person, even though they're not a client, they're not a party at the time, if that person reaches out to other people, their contractors -- and in this case, the ad agencies -- who the department has insisted are independent, they have no control over them, that's privileged, too.

That would make any time the government reached out to any government employee and that employee reached out to any other contractor all within the universe of privilege, which is directly contrary to how the Fourth

Circuit directs that we treat the privilege.

THE COURT: All right. Let's step back.

January 24th, 2023, someone from the Department of Justice writes to a federal agency and says I want information, and they then reach out to a representative or their contractor to get information.

You're saying that wouldn't be covered by a privilege?

MS. DUNN: You're speaking about after filing?

THE COURT: Right. I'm just trying to figure out what -- why, in your mind, is the magic date the filing of the complaint.

MS. DUNN: It's not just in my mind, Your Honor. These are parts of the investigative file that DOJ collects, and to which we are entitled pursuant to statute and pursuant to the DOJ manual. DOJ acknowledges that these are communications from its investigative file, and they say in the Wolin declaration, which are their evidence, it's their burden, they say that this is communications for information-gathering purposes about digital advertising purchases by federal agencies to aid in the Antitrust Division's investigation.

So that is only what we're asking for. We're not asking for any opinion work product, any attorney mental impressions. And this is -- the entire point of work

product is to provide a zone of privacy for an attorney. So by the time that a suit is brought, there is a distinction made. And, actually, the government itself made this distinction in the *Booz Allen* case. And I think it is worth reading what the Court said in that case.

THE COURT: I have it in front of me. Just tell me where you are.

MS. DUNN: It's at page 3.

THE COURT: Where they decided at some point to not turn it into a deliberative process or not call it attorney work product, but they called it not attorney/client privilege but work product; is that what you're talking about?

MS. DUNN: Your Honor, not exactly.

At first what the government did is it said that these were privileged documents prefiling of the complaint because the NSA was DOJ's client. Then after -- between the first and second privilege log, it changed its view, which the Court agreed with, and then also took this position in the hearing. This is, by the way, only a year ago. It's the same Antitrust Division. And it said that the government drew a line between the DOJ's initial inquiries with the agency where DOJ first played the role of an investigator and the time when the DOJ decided to file the present lawsuit where --

THE COURT: Decided to file --

MS. DUNN: -- the DOJ became counsel.

THE COURT: Decided to file the present lawsuit.

On December 22nd, I have an affidavit saying a draft complaint had been filed, prepared.

MS. DUNN: Your Honor, if that were the case and that is what applied, it would apply to all of the communications in the investigative file after that date and before the filing. But it doesn't. And DOJ has turned those over. It kept turning over investigative file material until the complaint was filed. It, itself, drew that line. And if the DOJ's position about privilege is accepted here, it is going to apply -- it would apply equally to all of these third-party communications that they had -- that they already turned over and that they're required to turn over.

There's no distinction between the rest of the material in the investigative file where the government is reaching out to get information from third parties than there is when they reached out to get information from the agencies.

And actually at the time of filing, Your Honor, they weren't even claiming damages for seven out of the eight agencies. So that's all later, too. We are only asking for the facts to which we are entitled that are not

privileged, and documents that, if Your Honor reviews them in camera, we feel very confident you will see that they just have to do with the facts; the how, what, when and where of the agencies' purchases.

And I -- Your Honor, I completely understand that these are complicated issues and we are on an expedited schedule, but this is a crucially important case, and this -- these communications with -- they are the plaintiffs in the case. They are the people -- they are the entities claiming damages here. So -- and they are -- they are the only evidence that the government is going to put forward to support its damages and that we have to test about the market that exists in this case. So we wouldn't bring this to Your Honor if it wasn't crucially important.

THE COURT: Well, again, circle back around to what evidence about them purchasing advertising do you think you're not going to have? That is, the contracts, the way that it's done, the amount that's been purchased, how it was used, all of that, the substantive information about how they actually buy it. What is it that you're not getting that you think you would get in these, you know -- you know, we're looking for information, can you help me gather some information.

MS. DUNN: Your Honor, there -- so, first of all, we -- there are documents that we cannot see, so I can't

tell you what's in the documents that we can't see, but --

THE COURT: What is it -- what is it you think might be there other than --

MS. DUNN: Yes.

THE COURT: -- your knowing -- and, again, you know, this is --

MS. DUNN: Yes. So, Your Honor, there is an analogous document that we've pointed Your Honor to, and that is between one of the agency's OIGs and --

THE COURT: I read it.

MS. DUNN: Okay. So we expect to see more of that. What happened in that case --

THE COURT: Again, you're not answering my question. Whether they understand certain things, whether, you know, this term is familiar or not familiar. I'm asking you a very specific question, and if you don't understand it --

MS. DUNN: I understand it, Your Honor.

The government puts forward a market for open web display advertising. When it went out to these third parties, they did not understand what that meant. And that meant that the people on behalf of -- on whose behalf the suit is being brought, and some of the only witnesses that can testify to the commercial realities of the market, did not understand the DOJ's relevant market, they didn't

understand what they were talking about. When they talked about buying from third parties, they didn't know what that was. And also you're going to find that the -- that the agencies thought about the market much more broadly. They thought about the market as including Facebook and TikTok and Amazon and all of the things that the government gerrymanders out of its market. That's one thing.

The second thing that we expect to find is information directly relevant to whether the agencies are direct purchasers. And we have very limited depositions that we can take in this case. Non-party depositions have to apply, not just to these agencies, but also to all the many third parties. And other courts that have looked at substantial need have found that that is -- even a much greater number of depositions available have been too limited to get the information.

But the truth is that, you know, we are seeing the witnesses evolve their testimony now after preparation with DOJ. And the documents that pin these agencies in to the -- to the information that they provided when they were first asked these questions about how they buy and what the market is and the whole underpinning of this entire case is about how entities buy advertising. That is extremely valuable evidence to us or else we would not be here.

We are going to spend an enormous amount of time,

both at summary judgment and perhaps at trial, on this issue of relevant market. It just couldn't be more important. It's the threshold issue and the core to every civil antitrust case. And we -- the testimony -- there's been clawbacks of testimony on this topic and documents on these topics, and not only the immediate testimony of the federal agency advertisers, the communications between the agency advertisers and the ad agencies.

These are ad agencies that the Department of Justice has insisted this entire time they have no control over. How can there be any privilege between the federal agency advertiser, who's in no client relationship with the Justice Department at this time, only gathering facts, not opinion, reaching out to the agencies with whom they have the existing contract with? There's no way that that could be privileged.

THE COURT: Why wouldn't that be work product?

MS. DUNN: Well, first of all --

THE COURT: All right. Let me put it in the scenario of on January 28th of this year, an agency asked for their advertiser to prepare information for them for the purposes of this lawsuit at the direction of their lawyer, and they aid them in preparing information and providing it to their lawyer, do you say that isn't work product?

MS. DUNN: I think it may be work product if it

was at the direction of counsel in anticipation of a litigation; however --

THE COURT: All right. Well, let's just assume the date that I said, January 28th, was after this lawsuit got filed.

MS. DUNN: Right.

THE COURT: That's why I picked that date.

MS. DUNN: I think there would still be a close call about the agency relationship in that circumstance. And that is the same conversation that happens in cases where a lawyer directly hires a PR firm or an investigator or an accountant.

I think in this instance, it's actually not a close call at all. The witnesses in this case have expressly testified that they understood that the Department of Justice was gathering information, that they didn't anticipate litigation, that the time when they began to anticipate litigation was when the complaint was filed.

One of them said this was a standard request for information; another said it was a routine request for information. And the witnesses that have testified so far, which is what we have to go on, have uniformly testified --

THE COURT: Let me -- we're not going to have any note passing anymore. It's very distracting. I'm sorry.

MS. DUNN: Apologies, Your Honor.

THE COURT: Five times is enough.

MS. DUNN: The agencies have uniformly testified -- the agencies have uniformly testified that they did not anticipate litigation at this time, that this was purely investigatory, that's how they regarded it, and there's no contrary evidence in the record.

The only -- now, first of all, it is their burden, as I'm sure we can all agree, and so they have put forward the Wolin declaration.

Now, the Wolin declaration is one of the best documents I think for Google in this record, and that's for what it doesn't say. It doesn't say that these agencies were seeking legal advice. It doesn't say that the information is opinion or mental impressions. In fact, it says it's factual information-gathering. And it doesn't say that any information was conveyed to the agencies such that they would anticipate litigation. And it doesn't say that Mr. Wolin directed the agencies.

Instead what it says is it says what the agencies did were communications made in direct response to my questions. Now, there is no direct response to my questions standard of privilege. It cannot be that a government DOJ employee reaches out, somebody does something in response to that request for information, and that all of a sudden is within the very narrow zone of privacy that the privilege

cases recognize.

The entire point of this is to protect lawyers who go out and hire agents to do part of their litigation work. And that on the record we have, which is what the Court must consider, and it's their burden.

We have agencies that say DOJ was not my lawyer, I was not seeking legal advice, I didn't anticipate litigation, the first time I knew about a complaint was when it was filed, I didn't know I would be a witness in this case and have no knowledge of being directed. They say it was a standard request for information and a routine request for information. None of that is privileged, Your Honor.

And I want to be very -- I want to be --

THE COURT: Let me go back to that.

MS. DUNN: Yeah.

THE COURT: At least the testimony that I have seen is this wasn't a standard request for information, I have never gotten a request for that kind of information, I've never dealt with them in the past. Is there contrary testimony?

MS. DUNN: Yes, Your Honor, there is.

This is on pages 9 and 10 of our brief -- of our reply brief, and on pages 10 and 11 of our reply brief. And I have the pages in the depositions marked here. I can pull the cites for you, but they're in the brief.

THE COURT: I'm looking -- I mean, I read the depositions that you provided me last Friday.

MS. DUNN: Okay.

THE COURT: And the ones that were there last Friday said, out of the blue, don't have dealings with them, don't know about them, you know, this was not something that I ordinarily do, this was unusual.

So you're saying that's --

MS. DUNN: I'm saying that two out of the four witnesses testified. One said it was -- they felt it was a standard request; the other uses the phrase "routine request for information."

But also the point is, they weren't anticipating litigation; it was a request from one agency to another. Whether or not they hear from DOJ regularly, all of these witnesses have said they weren't anticipating litigation. And they've all said that -- they've uniformly testified they didn't think they were harmed by Google. This is not a circumstance where in order to create an attorney/client privileged relationship, the client has to be seeking legal advice. They have to be communicating in a confidential way with a lawyer for the purpose of seeking legal advice and to know that they are seeking to be a client.

THE COURT: Or involved in a legal proceeding. It doesn't necessarily have to be legal advice. Information

relating to the legal proceedings.

MS. DUNN: Right. But the client has -- it's the client's privilege, and they have to show that they are the client, and they have to be seeking information from the lawyer. That's the exact opposite of what was happening here.

These are the same kinds of communications as when the government went out to myriad third parties, who we also are deposing, as they did here.

And, Your Honor, just to be clear, the government didn't make this outreach to these agencies, who are the plaintiffs in their case and relevant for market and damages, until that three- to four-week period from December to January.

So we're just seeking the investigative material to which we're entitled, and that's the same as in the rest of the investigative file. It's not -- we're not -- you know, if they had reached out to the agencies before to gather information, we would want that, too. But we completely understand that at the time after the complaint is filed, everybody should anticipate litigation, there's been a publicly-filed complaint, and that is what the witnesses testified to.

I think if you look, Your Honor, at the cases on -- that focus on the idea of work product, this is not

really a close call. Like, the challenging cases are where the attorney has gone out to hire a PR firm or something like this, or an accountant, or somebody to assist where there's a direct retention. It's not a case where there's a third party who has a preexisting relationship to do some sort of contracting work providing facts, which is what we have here. And we have cases that are cited in the brief as to that.

But the DOJ's words speak the best themselves, which is they have sent us correspondence saying these agencies are independent. They are not under our control. We need Rule 45 subpoenas. So it can't possibly be that this is a situation akin to the harder cases where the lawyer directly goes out and hires somebody to do their legal work for them. And even in those cases, the fact -- the facts are accessible to the other party, and what is redacted is the opinion work product.

We have no problem with any redaction of mental impressions. We do not think there will be any because this is not a circumstance where the agencies are making conclusions and recommendations for the legal work; they're just providing information.

And, Your Honor, I'm concerned that I haven't convinced you that we need this information, and we really, really --

THE COURT: Well --

MS. DUNN: Yeah. We really, really do.

I think it doesn't -- if no privilege applies, we're entitled to it anyway.

THE COURT: Well, you're the one who's saying it's crucial. And, again, I am, again, at a loss, honestly, as to the substantive information about how they purchase their advertising, whether they're a direct purchaser, what it is and those kinds of things. That --

MS. DUNN: This is the -- sorry.

THE COURT: No, I'll let you go. Interrupt me all you want.

MS. DUNN: No. No. No. I just can't -- I just couldn't hear. I couldn't hear. Go ahead.

THE COURT: The information concerning how they purchased their advertising, whether it's directly or through an agency, how that is done and how the process is done to get whatever advertising that they do, that's all information that is discoverable, and you should be getting that. And whether -- if you're not getting that kind of information, that is substantive information about how they get their advertising, then you should be coming in on a motion to compel that.

The question is, you know, whether you get these documents about some investigative information that they

then determine whether to bring a claim or not. And whether they have a claim or not, you'll be able to litigate that when you get the substantive information about how they get their advertising, what kind of advertising they get, the process that's been followed.

The same goes with the defamation. You know, that is going to be a legal issue that one has to get determined. And what one person's agency thinks -- you know, you're going to have experts; they're going to have experts. You know people don't understand this; they don't understand that. Somebody's going to have to make a decision.

But, again, I'm at a loss as to how you think that is so crucial to your case.

MS. DUNN: Your Honor, the information that was gathered -- which, again, is not privileged, and so we are entitled to it, regardless of substantial need in the first instance -- is what the agencies said when they were asked for facts in the first instance. And when it's -- and it also is their communications with their ad agencies. So that has a probative value that is unlike after-the-fact testimony.

What they said initially to the DOJ about the market, what they said in thoughtful responses about how they purchase their ads and what markets they operate in, and then the conversations they had with their own

contractors with whom they work all the time about the ad buying. That is what we expect to find, and it is only factual information to which we are entitled. And we believe it is important for the following reasons, which I will re-enumerate, because I believe that they are so important.

One is, market definition isn't just a legal concept. The legal standard is commercial realities. So the commercial realities that the government has injected in this case is how these agencies are buying their ads and what they consider to be the market and their interactions with their advertisers.

And, by the way, we don't have enough depositions to depose all those advertisers or all the agencies that the government reached out to. We just don't have enough, even if we use them all for that. Okay. So that is going to be the relevant market, and these are the parties that the government has inserted as the commercial reality. That's the first thing.

The second thing is, if they don't -- if they are not direct purchasers, there's no damages case as a legal matter. And that information we expect will also be found in what they provided to the government in the investigatory stage. Only facts. We only want to know who's the purchaser in that circumstance; we don't want opinions. And

those are the kinds of questions we expect that they were asked.

So it's possible that the government will have no damages case, and on this basis alone, no entitlement to a jury trial. So we can't get to trial and test that.

THE COURT: Okay. Why don't you get those facts through the normal course of discovery? And, again, you still haven't answered that question, I don't think --

MS. DUNN: Well --

THE COURT: -- whether they are or aren't a direct purchaser.

MS. DUNN: I will tell you, Your Honor, first of all, we are trying to get those facts through the normal course of discovery. But, first of all, the normal course of discovery in every case like this, the government hands over its investigative file. That is the normal course of discovery, and the government, as in the *FEC v. Christian Coalition* has cited, the government is not allowed to take advantage of privilege to keep back documents that would ordinarily be given in discovery. That gives the government unfair advantage, and the cases say that that is not okay. So, first of all, we -- this is the ordinary course of discovery.

Second of all, we're taking depositions, but testimony is being clawed back. So anything that was told

to the government in this investigative stage, just the facts, is not available to us, and that would be the normal course of discovery.

Now, we can ask these questions, but as we point out in our brief, sometimes the witnesses don't remember. The documents, as recognized by the *Booz Allen*, other courts, are important to refresh the recollections and to remind, and also, frankly, Your Honor, for impeachment purposes, because now the witnesses are being better coached. They know what questions we're going to ask, and the answers have started to change.

So we need the documents in order to establish the testimony and test the testimony that's going to go to the very threshold issues of relevant market, of direct purchasers and the not insignificant issue of damages and whether they even exist and whether there should even be a trial with a jury impaneled. All of that has to happen before the trial.

And so I desperately want to convince you of this because I know how valuable this evidence would be. And I also think if Your Honor is unsure, we can submit to you in camera the documents. But I don't even think you get to the inquiry -- if I haven't convinced you, I don't even think you get to the inquiry of how crucial it is, even though it is, and we're so limited in our discovery if this is not

privileged.

And, at this time, the agencies themselves disclaim any attorney/client relationship. They disclaim knowledge of anticipation of litigation. They disclaim any harm. They say that they don't know of any anticompetitive acts on behalf of Google. They don't think that. So this is not a case where this extends the lawyer's zone of privacy.

And I will remind everybody that, you know, it is their burden to prove, and so in many cases in these depositions, they instructed witnesses not to answer questions that would have laid a predicate for privilege. Were you directed by the DOJ? Did you get instructions from the DOJ? Instruct not to answer.

And so all the Court really has, as far as evidence -- we have, on our part, the testimony of the witnesses that disclaim these bases of privilege, but what the Court has is the Wolin declaration.

So with respect to the first category we're asking for, which is communications between the DOJ and the FAA lawyers and non-lawyers, what the Wolin declaration says is that this is information for information-gathering purposes for the investigation. Okay. It does not say opinion, it does not say mental impressions. So Category 1 is not privileged. It's the same as what has been handed over for

any third party in the investigative file which was handed over until the date of filing. That's Category 1.

Category 2, what the Wolin declaration offers the Court is the coms made in direct response to my questions standard. Note, does not say he directed their work. And witnesses were instructed not to answer that question.

There is no case that is findable by the DOJ where the work product doctrine is used to shield fact-gathering efforts from third parties not retained by counsel, much less a third party previously retained not by counsel expressly for a different non-litigation purpose. You cannot find a case that --

THE COURT: That was a lot of -- go through that one more time so I make sure I understand what your point is.

MS. DUNN: Okay. Well, first of all, Your Honor, I want to make sure, because there are three categories of documents.

THE COURT: Right.

MS. DUNN: On Category 1, which is the communications between DOJ Antitrust Division and FAA lawyers and non-lawyers. That's Category 1. So there, what we're saying is, we only seek the prefiling fact-gathering communications; not the kinds of material that work product is meant to protect like opinion or mental impressions. If

there's any, it can be redacted.

And DOJ concedes two things that is relevant to the first category. Okay. Thing 1 is, the coms are from its investigative file. That's their opposition, page 3, they concede that. And the Antitrust Civil Process Act and the Antitrust Manual say we're entitled to this -- to the stuff in that file. Okay.

The second concession that they make -- this is Wolin paragraph 8 -- is that these coms are for information-gathering purposes about digital advertising purchases by federal agencies to aid in the Antitrust Division's investigation. Okay.

THE COURT: So that's work product, to aid in their investigation as to whether to bring a lawsuit. That's the DOJ's -- they are getting information to make considerations as to whether to file the lawsuit that they've drafted.

MS. DUNN: Your Honor, respectfully, it is not work product --

THE COURT: Why not?

MS. DUNN: -- and I'll tell you why.

It is work product when the preparer of the work -- so if you think about hiring like an accountant or a PR agency, the preparer of the work has to face a claim or potential claim. So the preparer has to anticipate

litigation. And, here, that is not the case. Here, the agencies have universally testified they are not anticipating litigation at this stage. And there's no evidence that the DOJ told them that we're anticipating litigation. These are factual inquiries. And if the DOJ's theory was right and that was work product, it would extend to the entire investigative file, and there wouldn't be statutes and manuals that say we can have it. It is not work product.

Work product is when a lawyer -- and these are closed cases. When a lawyer hires a PR person, an accountant, some agent to go do something for them, and that person gathers information, and sometimes even then the facts they've gathered are discoverable. And, here, that is, you -- they are the preparer -- and this is in *RLI* and *National Union* and all of the cases on this -- that the preparer has to face a claim or potential claim.

Now, the main point I'm making on this, Your Honor, is that these cases are just an ill fit. Like, the investigatory stage is not the stage when the agencies are being deployed as if they're agents of the DOJ lawyers. That is not what's going on. And I think if you reviewed the coms, you would see that they're just saying, hey, we're looking for information. They're not saying, please, we're going to litigate, do our work for us and report back.

That's not -- that was not the purpose, and that's not the relationship between the preparer of information and the Antitrust Division.

And, in any event, there's -- all the evidence in the record is to the contrary, that they're not anticipating litigation at this stage. And the same Justice Department division expressly made this exact distinction in *Booz Allen* where they say there's an investigative stage and a post-filing stage. It was exactly the same thing. And if you look at the Judge's conclusions on work product in that case, as I know you have, she doesn't take a long time with them. She says the other party -- in this case the Google analog -- was seeking only the fact work product. Only the fact work product. And so that's similar here.

THE COURT: I mean, in that case, the Judge found it was work product and that there was a substantial need for it.

MS. DUNN: Actually, in that case -- I apologize, Your Honor. In that case, she did not find it was work product. What she did was under -- let's look --

THE COURT: "The defendants have established a substantial need and inability to secure factual information about alternative needs. They do not need to get opinion or work product."

MS. DUNN: She doesn't really decide. She

assumes -- at the beginning of the case, she assumes without deciding about deliberative process and goes through the substantial need analysis, which is very similar to this case. It's an issue of relevant market. The litigation proceeds at breakneck pace. Oh, the other factor is, is the DOJ a party. Right.

And then -- and so she concludes in the context of the deliberative process privilege that there's substantial need. And so by the time she gets to work product, all she really says is that the defendants do not seek opinion work product and do not challenge any redactions for mental impressions. And then she offers to look at anything questionable for mental impressions in camera.

There's another case, Your Honor, I just want to flag for Your Honor on the same topic, because a lot of this I think does hinge on this distinction of opinion versus fact.

In Re: Lumber Liquidators, in that case, there were special tests performed during an investigation by previously hired agent, and even those did not qualify as opinion; those still qualified as facts. Here, we're not even asking for recommendations or opinions; we're just asking for the factual information that the agencies gave.

So that's Category 1, and I'm glad, actually, to have looked at the *Booz Allen* case on substantial need,

because I think this issue of the government being a party is obviously present here and relevant to that -- to that calculus. The same with the limited depositions and the need -- she goes into detail about why you would want documents for use in depositions. That's Category 1.

Category 2 is communications between the FAAs -- oh, I should also say, Category 1 includes communications with FAAs and non-FAAs. They're agencies that don't even end up being damages-seekers or parties in this case. So they're just third parties. So that seems -- you know, obviously very hard to distinguish that from any third party.

Category 2 is communications between the FAAs and their ad agencies. Now, this is -- this is where I was saying that there's no case where the work product doctrine will be used to shield a third party's fact-gathering efforts that are not retained by counsel, and when the agent is previously retained not by counsel for an entirely other purpose. And the DOJ has communicated to us that these ad agencies are not under their control, they're independent, and that the only contract that exists is for digital ad purchases.

So this -- you couldn't -- they have not cited any, and I can't actually imagine a case where an agency previously hired for a non-litigation purpose, not by a

lawyer, not doing anything having to do with the litigation that's gathering facts at an agency's request, somehow that ends up being privileged.

THE COURT: Well, privileged or protected under the work product doctrine. That's the issue, and there are cases --

MS. DUNN: Your Honor --

THE COURT: -- that do that.

MS. DUNN: -- I'm unaware of any case. I mean, I would be happy to discuss any case, but I have not seen any case. And I am talking about work product -- that was a very good correction; I apologize -- where there's an agency previously hired for a non-litigation purpose by a non-lawyer that's just gathering facts, not opinions and not recommendations, and that that is somehow attorney work product within the zone of privacy. And I think when you layer on that -- this investigative phase and the fact that, you know, the investigative file is required to be turned over, I don't -- it's very hard to imagine that that could be work product.

The third category is a small category, it's interagency communications with no lawyer on them. So we are not seeking any interagency communications between the agency lawyer and the agency employees. Those would obviously be privileged. But, here, there are some

communications which are coms between agency non-lawyers that would not be privileged. And that's not a huge number.

For both Category 2 and Category 3, the record is the Wolin declaration where he says coms made in direct response to my questions. And this is a very sweeping concept of work product and privilege that somehow the DOJ can call -- the Antitrust Division can call somebody up, ask for facts, and then anything that that triggers -- if that triggers a call to a contractor to get facts, that that is within the zone of privacy of the attorney work product, especially in the Fourth Circuit where every case -- as I'm sure Your Honor is aware, as every case stresses how the privilege is narrowly construed and limitedly recognized.

And so this is -- you know, it's sort of like a seriatim theory of privilege where if they ask for facts in their investigative stage, don't say, you know, not in anticipation of litigation from the point of view of the preparer, that those communications and then every communication down the line ends up being privileged.

I don't know if Your Honor is interested in hearing about the deliberative process privilege, but the cases on that are *Ethyl Corp. v. EPA*, *Moore-McCormack Lines*, both Fourth Circuit cases. And those make clear that to be within the deliberative process, it really -- the deliberative process privilege is really concerned with the

exercise of policy discretion. And this is also an issue that the *Booz Allen* Court confronted. And she went through an entire balancing test that the government just entirely ignores. They say that the *Booz Allen* case is only about the need for documents in a deposition. That's Footnote 8 of their brief. But she cites to *Ethyl Corp.*, which says that the materials at issue have to bear on formulation or exercise of policy-oriented judgment. And that's, you know, how the deliberative process privilege is generally understood.

THE COURT: Okay. Anything else?

MS. DUNN: Not if Your Honor does not have any questions. I also do not know if it is helpful for me to enumerate for Your Honor at some point what we are seeking. We have --

THE COURT: Well, you've said that in your briefs; right?

MS. DUNN: Yeah. Thank you.

THE COURT: I'll hear from the government.

MS. CLEMONS: Thank you, Your Honor.

The Department of Justice is empowered by statute and regulation to be counsel to the United States and its component agencies. And the Attorney General is vested with the authority to bring claims on behalf of the United States and has delegated that authority to the Antitrust Division

for the purposes of bringing antitrust claims, specifically at issue in this particular motion, the antitrust claims for damages on behalf of the United States and its component federal agencies when it's injured in its business or property by antitrust violations.

So counsel for Google mentioned that they agree that intra-agency counsel, the in-agency counsel, communicating with employees of a federal agency are attorneys for that federal agency and that those communications are privileged but compares the Department of Justice, which is statutorily retained, essentially, to be the lawyers for the United States and its agencies, discounts that relationship, that attorney/client relationship, between the Department of Justice and the agencies.

The Department of Justice was providing advice and counsel to these federal agencies regarding damages in this case.

THE COURT: Where do I have that in the record? Other than what -- I mean, you've got testimony of people who say out of the blue, didn't know anything about it, never heard anything about this lawsuit until it got filed.

MS. CLEMONS: Certainly. Your Honor, they're the individual employees.

THE COURT: Well, these were taken -- it wasn't

clear, but counsel for Google represented that these were 30(b)(6) deponents. Is that not right?

MS. CLEMONS: Your Honor, the first 30(b)(6) deposition of any federal agency occurred this morning. I was on my way to the courthouse.

THE COURT: So these are not 30(b)(6) depositions?

MS. CLEMONS: These are not 30(b)(6) depositions; these are depositions of individual employees.

And, in any case, I imagine that the individual employees working at Google that may have gathered facts and information and communicated with counsel for various purposes related to this litigation were not aware -- fully aware of Google's counsel's strategy with respect to this litigation.

But that does not change the fact that these were communications by counsel for the United States with employees of the United States to gather information to provide legal advice to the United States as to the scope of its damages claims after a complaint was already drafted, as is mentioned in the Wolin declaration, and it was after there was already an exploration into whether and to what extent the government would be seeking damages for injury to its business or property.

These -- every single communication and material that Google is requesting be compelled with this motion is

within that time frame, was made for not just the purpose of litigation, but for the purpose of this specific litigation, these specific damages claims, and for the purpose of the United States to be able to -- or the Department of Justice to be able to advise the United States and its component agencies with respect to the scope of those damages claims.

THE COURT: Well, help me understand the difference as to why that isn't just part of the investigative file that you turned over for everything else. I mean, if that's -- if that's the argument you're making, why doesn't it include the entire investigative file?

MS. CLEMONS: So the entire investigative file is information gathered throughout the course of the investigation, but the information gathered from these specific agencies that were the subject or could have been the subject of the damages claims in this case is classic attorney/client communication, not broad investigation. There's no allegation from Google or information anywhere in the record that these were just general investigatory processes, right, that we --

THE COURT: The heading of the emails that are in the privilege log says request for information, something vague like that. It's not like give me some factual information about certain topics.

MS. CLEMONS: Many of them do, Your Honor, yes,

but that does not change the fact that those communications -- the information was being gathered for the purposes of providing legal advice to the United States; it was being gathered about --

THE COURT: When did the attorney/client privileged -- when do you say that there was an attorney/client relationship with these agencies? When was that established in your view?

MS. CLEMONS: So the United States Department of Justice has an attorney/client relationship with the United States. It specifically has an attorney/client relationship with the United States for the purposes of advising on damages and potential damages, injury to the United States business or property and whether that supports a damages claim under the Clayton Act, Section 4A.

You know, there's no need for Your Honor to get to the broader question of when, under a bunch of hypothetical circumstances, attorney/client privilege may or may not attach, because attorney/client privilege was definitely attached at the point that the Department of Justice was speaking with these federal agencies about these specific claims and formulating and determining the scope of damages.

THE COURT: How do I know that? You're just telling me it's true, so it is true? I mean, I don't know. I'm trying to understand.

I know you ended up filing a lawsuit on their behalf in January, but I don't know when it was that that relationship actually was consummated, so-to-speak.

MS. CLEMONS: That relationship already existed, Your Honor.

THE COURT: Well, you know, obviously you represent agencies in a lot of different matters.

MS. CLEMONS: Yes.

THE COURT: And the attorney/client relationship in one matter doesn't necessarily carry over to every matter that you're being investigated at any point in time. So, you know, there has to be some point where you, I guess, make a determination that, you know, you're now, you know, stopping the investigation and starting the trial preparation material and we're having attorney/client -- and, you know, the *Booz Allen* case is one that, you know, I think is favorable to Google in that regard. Because DOJ at that point said, okay, maybe not attorney/client up until the time the lawsuit was filed, but certainly you've got work product and deliberative -- you know, these other things that are involved here.

So I'm just trying to understand what it is that your position is as far as why those communications would necessarily be attorney/client information.

MS. CLEMONS: Because the United States Department

of Justice, specifically the Antitrust Division, is charged with developing and identifying and advising the United States and its component agencies with respect to whether there are claims for damages for antitrust violations. And so when the United States Department of Justice determines that there may be a violation that has damaged the United States and its business or property, the communications in order to provide legal advice with respect to whether those claims exist and the scope of those claims is communication within the attorney/client relationship.

THE COURT: Even though the client doesn't know what you're doing or asking for the information? How could it be an attorney/client relationship if the client doesn't know what the reason is behind the request?

MS. CLEMONS: The client in this case, Your Honor, is the United States, and the client, the United States, was well aware of the reason behind the request. And the -- you know, the Wolin declaration testifies to that fact, but --

THE COURT: Well, who's the -- if the client is the United States, then who -- I mean, DOJ is the lawyer, and the United States is the client? Is that what your analysis is?

MS. CLEMONS: Yes, Your Honor. And that is -- that is set out in 23 U.S.C. 516 that the Attorney General is the lawyer for the United States.

And for this specific purpose of evaluating whether -- whether and to what extent damages claims could be brought on behalf of the United States, the communications between the United States' counsel and the components of the United States that may have been injured are classic attorney/client communications and investigation of claims that the United States was seeking to bring.

THE COURT: What are your requirements to turn over information in the investigative file?

MS. CLEMONS: So we do have -- under the Antitrust Division Manual and Civil Process Act, we do have obligations to turn over facts gathered -- certain facts gathered during the investigative phase, but there is no obligation to turn over attorney work product or attorney/client communications.

I think it's worth noting, Your Honor, that every single document and set of materials that Google has challenged would not have been created, not only but for this litigation, but, but for the very specific need for the Department of Justice to provide counsel to the United States and these specific agencies regarding the scope of potential damages claims in this case.

THE COURT: And why -- help me understand your argument about those that you're not seeking damages being different from those you're seeking damages. What's your

position there? Because they're obviously not parties, so-to-speak.

MS. CLEMONS: They are not parties, but the reason that they are not parties is because of strategic decisions made by counsel for the United States and advice provided to the United States and those agencies with respect to whether or not they should be parties. Parties for the purposes -- sort of purposes for purpose of discovery in this case.

THE COURT: What limitations, if any, has the United States put on the ability of Google to obtain information about how ads were purchased, the relationship, whether, you know, the agencies are direct purchasers? And, again, I'm sort focusing on the substantive information as to how that advertising process works.

MS. CLEMONS: None, Your Honor. And the depositions that have been taken of individuals so far have focused in large part on information such as the ordinary course of their advertising purchases and their relationships with their ad agencies.

The government -- the federal agencies have produced, through the United States Department of Justice, millions of pages of documents that describe the ordinary course, use and understanding of their purchases of advertising.

The facts that Google is claiming are just facts

are really work product material that they're seeking that show the mental impressions of counsel and the strategic decision-making of counsel regarding which facts to gather in order to assess the specific damages claims on behalf of those agencies, which facts were important to that determination.

There is -- Google has not, you know, met its burden to show that these facts, facts about market definition, for example, are not otherwise available. They have asked questions during depositions. I presume they will continue to ask questions during depositions that go to those very issues. And they have been receiving information not only from the United States and those federal agencies, but from countless third parties related to this litigation as well.

THE COURT: Let me just ask you this scenario.

If you have a document request -- and I think it's Number 12 that asks about ad buys and things like that. If you have been provided information from an advertising agency about ad buys and it's within your -- and it just shows this is the information about ad buys, why wouldn't that be information that should be produced and provided to the defendant in this case?

MS. CLEMONS: Where that information was very specifically requested by counsel of its client, not by

counsel just going out to the ad agency asking for general information, but information the client was gathering for counsel in order to render legal advice. The composition of that information, the scope of what information was requested, and the format in which that was requested, do reveal the strategy, the legal impressions of counsel as to what is important.

There is -- there is not a clear black-and-white line between fact work product and opinion work product when the -- when counsel is asking for compilation of certain facts in certain ways in order to render legal advice. And, in this case, the ad agencies -- the very limited communications with ad agencies by the federal agency employees about the types of information that those ad agencies were contracted to retain and be knowledgeable about on behalf of those federal agencies.

THE COURT: Well, I'm not sure I understand that completely. Help me -- go back over that again.

Request Number 12, you know, purchase of open web display advertising and the use of the advertising. So you have information that has been provided to you by your advertising agencies relating to that request.

You say you don't have to produce that information?

MS. CLEMONS: Your Honor, anything provided in the

ordinary course of business -- and there are millions of documents provided in the ordinary course of business -- is being turned over through discovery. This is a very, very small subset of information, information gathered with the assistance of an advertising agency to put together responses by the federal agent client for counsel at -- made at the request of counsel.

THE COURT: You still have the obligation to provide that information; right?

MS. CLEMONS: That information --

THE COURT: The information is now within your possession, custody or control. You've reached out and you've gotten that information, and it's now within your possession, custody or control, they're asking for it.

MS. CLEMONS: They are asking for it, Your Honor, but it is -- it is protected work product, and we have -- we have obligations to log protected work product, and if there are facts that Google believes that it cannot get any other way -- facts, not opinions, not discussions with counsel, not determinations of what counsel thought was important in that moment to assess its claims, but facts -- then those -- then those facts -- they have to show that they can't get those facts in any other way.

And if the fact is the amount of purchases, there's innumerable sources of evidence for the amount of

purchases. The real fact -- they're not just asking for the -- just the numbers, right, or something like that. They are asking for all of the communications, all of the documents created at the request of counsel by federal agencies with the assistance of their ad agencies. And this is a very, very limited subset of information gathered, not for the purpose of generally investigating the case, but for the purpose of assessing with respect to that federal agency whether and to what extent the United States was injured in its business or property.

THE COURT: So you're saying that any time a lawyer asks for someone to get them information and it's sent to the lawyer, that lawyer doesn't have the obligation to then provide that information, whether in the same format or whatever, in response to a discovery request?

MS. CLEMONS: To be clear, Your Honor, it's not any time a lawyer asks for any information and any circumstance. Right. All of these privilege and work-product issues are very fact-specific and circumstance-specific.

But the compilation and curation of specific pieces of information that reveal the counsel's strategy and information that they thought was particularly important for assessing a particular legal issue, that is work product.

It's the -- it's -- the underlying facts are not

themselves protected outside of that circumstance, but when they've been put together into a piece of work product that cannot be separated from the request of counsel and the purpose of counsel, then they are protected.

And the questions that have -- many of the questions that have been asked during the depositions that have occurred so far have not just been did the Department of Justice direct you with respect to information-gathering; they've been specific questions about what the Department of Justice wanted.

THE COURT: Well, you've told them not to answer those questions, too, some of them.

Did you get instructions -- you instructed them not to answer those kinds of questions; right?

MS. CLEMONS: When the questions were about specific pieces of information. Right. So a document sitting in front of a witness saying did your -- did your counsel direct you to get this document or this specific information from some specific source.

But I want to -- I want to emphasize, Your Honor, that these are -- these -- you know, this issue of facts gathered under these very limited narrow circumstances for these limited narrow purposes from ad agencies is only a very small portion of what Google is seeking to compel here, which is all of the communications between the Department of

Justice and its clients, between -- and work product and information created for the purpose of assessing the damages claims in this lawsuit.

THE COURT: Okay.

MS. CLEMONS: Google is also requesting that we now log -- this is part of their motion, that the Department of Justice log every communication with just counsel for these agencies to the same ends, presumably, so that they can try to determine what counsel's strategy was and opinion work product.

THE COURT: Thank you.

Ms. Dunn, anything else you would like to add?

MS. DUNN: Yes, Your Honor.

Your Honor, with the Court's indulgence, I'll start with the government started, which is it sounds like their position is that all federal agencies are clients all the time. And there are two cases that we cite with respect to that. One is *Cayuga Nation*, an opinion by Amy Berman Jackson; and the other is the *Stonehill* case. And in both of those cases, they recognize that the Department of Justice, when there's a suit brought, is the lawyer for the agency, but the *Cayuga Nation* case in particular recognizes that the statute is permissive as to whether the Department of Justice may be sent to attend to the interests of the United States. And so it is simply not the case that at all

times all agencies are in a client relationship with the Department of Justice for the purpose of the attorney/client privilege. And, in fact, the cases say that the test that normally applies has to be applied where the client has to be knowing that it's seeking legal advice, a confidential relationship.

Now, the Department also said that the DOJ was providing advice. The Wolin declaration never says this, and this is nowhere in the record. Again, this is their burden. If the DOJ does provide advice, they could redact that. I don't think that's what will be found in these documents. But that's not what we're seeking; we don't want their advice. But, again, it's their burden. Nowhere in the record is there evidence.

And, in fact, the Wolin declaration is very particular in not saying that. It talks about these were information-gathering exercises. It does not say these are -- you know, it doesn't even say there's an attorney/client relationship. It does not say those things because -- presumably because it wasn't the case. I think if they could say those things, they would be in the declaration.

Now, with respect to anticipating litigation, the Department's responsible. The United States was aware. Well, under the cases, that's not sufficient. So, first of

all, the rule itself says it's the party's representative -- either the party or the party's representative, right, is going out to create this work product. And one thing that has struck me as I've read all these cases, Your Honor, is it talks about work product being prepared. It's always about it being prepared. So the cases *National Union* and *RLI* that are in the Fourth Circuit, they talk about the preparer needing to anticipate a claim, anticipate litigation.

So these cases are even an ill fit, and the rule is an ill fit because it's not -- here we don't have a party representative going out to do work for the attorney, as the case generally applied to; we have an information-gathering exercise from an entity that -- where the witnesses have uniformly testified they are not anticipating litigation.

So it's -- even by -- even if Your Honor decides the work product rule applies, notwithstanding the fact that these are not party representatives out to do work for the lawyer, the preparer has to be aware under Fourth Circuit precedent.

I think the other statement by the DOJ that highlights the untenability of their position under the law is the idea that non-party agencies are clients. These are third parties. They're not parties to the lawsuit; they were really sources of information.

Now, I do think it is helpful that -- I heard the Department counsel acknowledge their obligation to hand over the investigatory file, and --

THE COURT: Non-privileged information in the investigatory file.

MS. DUNN: Yes, Your Honor. Except for information that is privileged.

But there is no argument from the Department that contradicts the record evidence that they have provided that this is fact-gathering. There's really been nothing that's been pointed to in the record -- again, it's their burden -- that says these are anything beyond facts that are being gathered.

Now, I want to also point out, we are not aware of any compilation of a unique mix of information that counsel just referred to. We really believe these agencies were just responding with information that they had based on their experience and that their agencies had. And the Wolin declaration sets out the standard of comments made in direct response to my questions. So we don't expect that these will be compilations by agency lawyers designed for litigation; they're really just the facts, and that's what we're interested in.

To Your Honor's question about has the government been providing us with all the information that we need, we

have asked three times for them to supplement Rog. Number 14, which is about direct purchases of open web display advertising from counsel. And to date, the DOJ's response is, FAAs purchase ad tech services.

So we are not getting all the information that we need, and I -- but I do stand by my prior argument that given that we are going to have a trial in this case, and we are going to have -- these are our witnesses. These are the eight agencies that they have injected into this lawsuit. They are who we have. And their experience in the ad market -- and these are the -- you know, these are the people we have, they're on the correspondence. These are the people that are going to establish what the basis of the government's case is as far as ad purchases and ad buying.

So we can ask questions of them, and we do, obviously, but I really don't think it can be overstated the importance of documents and communications and facts that were -- that were provided -- to which we're statutorily entitled -- when asked these questions in the first instance, and the communications of the agencies that are responding. I mean, we have to have a way to hem the witnesses in, and we have to have a way to remind the witnesses what they're talking about.

So I do think that, you know, we can just have examinations without documents, but, Your Honor, documents

are very important when you're examining witnesses on the stand, as I know Your Honor knows. And here is going to be no exception when these are witnesses prepared by the government seeking damages. We need to be able to examine them.

So I -- one other piece I want to respond to is this idea of opinion work product, because it did sound like the Department of Justice is taking the position that when their lawyer asked a question, everything that came back reflected his mental impressions and his decision-making.

Their Opp. 7 says: "Information in the communications included the nature and extent of purchases of digital advertising by agencies." "Nature and extent of purchases." That's from their opposition. That's what we're looking for. That is not mental impressions.

Wolin paragraph 8: "Communications undertaken to gather information about digital advertising." And I will say, one of the reasons that the balancing test that the Court goes through for the deliberative process privilege and that the *Booz Allen* Court did talks about whether the government is a party. And that's because when any party gathers information, that is discoverable by the other party, and they don't want to give the government a leg up because it's -- just because it's the government when it's a litigant. And here in this case, it's not just a litigant;

it's a damages-seeking litigant. This is a civil case for damages; these are the damage-seekers.

So, in any other case, if we were not sitting across the table from the Department of Justice and the agencies who are seeking damages, we are just a damages-seeker and they had information that was the facts, we would be entitled to that. And so we should not be disadvantaged in this civil litigation, and that is why that is a part of the balancing test of substantial need, in addition to the idea that, you know, as Judge Brinkema said when this case set off, it's breakneck pace. We are in depositions all the time. We don't have that many of them. And we can't possibly depose all the federal agencies that gave information to the DOJ, we can't possibly depose all the ones that aren't parties, as well as the ones that are parties, and we truly cannot possibly depose all the ad agencies as well. I mean, we have 20 non-party depositions. So it's just not feasible to do that.

So, Your Honor, those are the primary points I wanted to get to in rebuttal. I'm happy to answer obviously any additional questions. But I really want to end where I began, which is, I assure you, Your Honor, we would not be here if we didn't think this was crucial and if we thought we could just make up for all of this at trial.

It's -- you know, in order for experts to opine on

relevant market, they need facts in the record at trial. In order to present the issue to the Judge eventually upon relevant market -- which if their relevant market is wrong, this whole case goes away. The whole case goes away. And those communications where, you know, the one analogous communication we have by the OIG, the one you saw, the government is saying to the agency, the agency doesn't know what they're talking about when they say third parties, and the government says, no, we're not asking about Facebook or Amazon or TikTok -- they mention at least two of those three, maybe all three -- we don't want your information about those, even though that's what the agency might think.

That communication goes directly to what we need to show about relevant market. These are people in the market, and they're -- it's not going to be every witness in the market. These agencies are in the market. Okay. And that's who we have, and that's who they have put into this case.

And so if there are more documents like that in this pile -- which I hope, Your Honor, if there's any ambiguity, would review them in camera. If there are documents that are saying by the government, we don't care about Facebook, that's not something that we conclude in the market, that goes directly to our contesting the market that they have established. And when the agencies say that's not

who we think of when we think about third parties, that's not how we go about ad buying. And when the agencies come back who ad buy for a living -- who we can't depose all of them because of limited depositions -- and they say the same thing, that is critical evidence that we need for this case, Your Honor.

Look, it's a hard case, and the critical issues -- and it's not just a hard case; it's a case that is going to define permanently -- it's a path-breaking case that will define permanently what this market looks like. And as you know, the government is seeking to break up the company.

So this is not a light ask that we're making. These documents go directly to that, to that critical issue of market. It goes directly to whether a jury is even available to them. We can't even get to trial and work this out. We need to know beforehand whether or not they hire direct purchasers, information we cannot get, apparently, through our interrogatories.

So I don't want Your Honor to think that these are not -- what we said is true; there's a reason we put it in the first paragraph. It is crucial, we believe, to our defense of the case on both the damages component and also the case overall, because there's no civil antitrust case that can go forward without the government proving its relevant market. And so far in the analogous documents

we've seen, they can't.

And having one document between one OIG and one agency is fine, we're happy to have that one, but if there are more out there for these agencies and how they reacted when they were presented with, you know, this concept, that's, like, you know -- that's extraordinarily probative for us.

And we really appreciate Your Honor's time today.

THE COURT: Were the depositions we were talking about 30(b)(6) depositions or not?

MS. DUNN: I apologize, Your Honor. We are taking -- I was incorrect about the --

THE COURT: That's all I have.

MS. DUNN: Yeah. I apologize.

THE COURT: Okay. Well, I think I have a slight better understanding of what the issues are in this case.

MS. CLEMONS: Your Honor, if I could just --

THE COURT: No. No. They're the movant.

MS. CLEMONS: Okay.

THE COURT: You had your argument; they had their reply.

I'm going to end up having to take this under advisement. If I want to have additional argument next week, I'll let you know by Wednesday, otherwise I'll try and rule on the papers at some point, but I'm not prepared to do

it today. There's too many open issues to try and figure out what you all are really getting at in this case.

So I'll let you know by Wednesday if, in fact, I need more argument on this in addition to the other motions that are currently scheduled for next Friday as well. Hopefully they may not be necessary, but just let me know on that front.

I also want to let you know, I'm not hearing motions on the 8th of September. So to the extent you have planning purposes or things like that, I'm not having court on Friday the 8th.

I'm going to take a five-minute recess to take up my other matter. Thank you.

(Proceedings adjourned at 12:33 p.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR